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Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Inquiry Concerning the Deployment of)
Advanced Telecommunications) CC Docket No. 98-146
Capability to All Americans in a)
Reasonable and Timely Fashion, and)
Possible Steps to Accelerate Such)
Deployment Pursuant to Section 706 of)
the Telecommunications Act of 1996)

COMMENTS OF AMERICA ONLINE, INC.

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EXECUTIVE SUMMARY

CONSUMER CHOICE AMONG PROVIDERS OF INTERNET SERVICES MUST BE PRESERVED TO ENSURE THAT THE PUBLIC FULLY BENEFITS FROM EMERGING BROADBAND NETWORKS

The success of the Internet in the narrowband world powerfully demonstrates the wisdom of a public policy framework that ensures an open telecommunications infrastructure free of electronic gatekeepers, while refraining from regulation of the robustly competitive Internet marketplace operated over that underlying infrastructure. AOL urges the Commission to strike the same critical policy balance for the emerging broadband world.

Today, thousands of companies both large and small offer residential subscribers narrowband Internet services with a variety of price and feature options. Since last-mile facilities on which narrowband Internet services rely are open, consumer choice flourishes, demand for information services grows steadily, and the public interest benefits of such services are broadly available to consumers.

With the development of “broadband” networks, consumers will expect the preservation of the openness and consumer choice that have characterized and driven the Internet in today’s “narrowband” environment. Consumers should not have to purchase two ISP services to get the one service they want. If these expectations are not fulfilled, the market for cable broadband access will neither develop as rapidly as it otherwise would nor achieve the ubiquitous deployment and penetration that the public interest warrants.

Therefore, AOL strongly supports the Commission’s efforts to promote the availability of advanced telecommunications capability to the American public. AOL believes the Commission should continue to rely on market forces to facilitate the competition and innovation that have been the hallmark of the Internet. At the same time, the Commission must be prepared to

intervene to ensure non-discriminatory access to the “last mile” facilities upon which the Internet rests and depends.

Accordingly, in order to ensure that broadband networks permit the same consumer choice and openness that has driven the success of the narrowband Internet marketplace, the Commission should:

- Require cable operators providing broadband access to an owned or affiliated ISP to make such access available to unaffiliated ISPs on a fair and non-discriminatory basis, thereby according consumers of cable broadband services the right to select the ISP of their choice without being forced to pay for another, unwanted ISP service;
- Require incumbent LECs, and any separate advanced services affiliates they may establish, to treat all unaffiliated ISPs in a fair and non-discriminatory manner, thereby according consumers of broadband telephony services the right to select the ISP of their choice;
- Encourage competition in last mile data transport facilities by requiring open and non-discriminatory access; and
- Decline to regulate peering arrangements in light of existing competition in the Internet backbone marketplace.

These measures will ensure that that the potential benefits of broadband services are indeed realized by the American public.

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COMMENTS OF AMERICA ONLINE, INC.

America Online, Inc. ("AOL") hereby submits these comments in response to the Federal Communications Commission's ("Commission") Notice of Inquiry issued in the above-captioned docket.¹ Our comments focus on promoting the openness of "last mile" wireline infrastructures in order to ensure that consumers of Internet services will enjoy the benefits of advanced broadband capabilities.

I. INTRODUCTION AND SUMMARY

Since its founding in 1985, AOL has played a leading role in developing a vibrant Internet online service medium capable of delivering information, entertainment, and

¹ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, FCC 98-187 (rel. Aug. 7, 1998) (Notice of Inquiry) ("NOI").

interactive services to consumers around the globe.² Today, AOL operates two worldwide Internet online services: America Online, with more than 13 million members, and CompuServe, with approximately 2 million members. AOL's members receive the benefits of original programming and informational content, e-mail capabilities, access to the World Wide Web and information databases, opportunities to engage in electronic commerce, and opportunities to participate in online "chat" conferences. While AOL is capable of being delivered over both narrowband and broadband systems, the vast majority of AOL's members are residential consumers with dial-up telephone connections, using the service for personal education, information, recreation and entertainment.

Wireline telephone and cable facilities that provide "last mile" access to consumers are a critical link between the public and the wealth of benefits offered by Internet services. In the current "narrowband" environment, where consumers access information service providers ("ISPs") primarily through the public switched telephone network, the open architecture of this network encourages a robust, competitive market at all levels of the industry – from providers of information services to backbone facilities. Since no entity other than providers of last mile facilities has the ability to become an "electronic gatekeeper," consumer choice has flourished, demand for information services has grown steadily, and the public interest benefits of such services have been deployed broadly to consumers and businesses alike.

The deployment of broadband wireline infrastructures, provided both by telephone and cable companies, presents a much-anticipated opportunity to expand and enhance the profound

² Headquartered in Dulles, Virginia, AOL currently operates in the United States, Canada, the United Kingdom, France, Germany, Sweden, Switzerland, Austria, Australia, and Japan.

public benefits associated with the development of the Internet. Because other emerging broadband infrastructures, such as terrestrial wireless and satellite services, are not yet widely available, competitively priced, or free from technical limitations, wireline broadband access networks currently offer the best opportunity for the delivery of valuable new broadband benefits to consumers, including faster data transmission speeds and “always-on” network connections. The rapid deployment and adoption of broadband capabilities, and the ability of consumers to fully enjoy the benefits of such capabilities, depends critically upon the preservation of the openness and consumer choice that has characterized, indeed driven, the development of the Internet in the existing narrowband environment.³

To this end, AOL strongly supports the Commission’s efforts to promote the availability of advanced telecommunications capability to the American public. In doing so, we emphasize the fundamental distinction between, on the one hand, the FCC’s obligation to regulate underlying transport infrastructures, when necessary, so that “bottlenecks” do not foreclose consumer choice in access to the Internet, and on the other, Congress’ to “preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation.”⁴ While the Commission should ensure openness in the

³ Requiring open networks refers broadly to non-discrimination requirements intended to safeguard consumer choice by prohibiting network owners from favoring themselves or their affiliated companies. The approach to how such requirements are implemented vis-à-vis telephone or cable networks may of course differ due to the differing regulatory histories of the cable television and telephone industries. See Barbara Esbin, “*Internet Over Cable: Defining the Future In Terms of the Past*,” OPP Working Paper Series No. 30, Federal Communications Commission, Office of Plans and Policy, August 1998 (“*Internet Over Cable*”).

⁴ 47 U.S.C. § 230(b).

infrastructure underlying the Internet and on which the Internet rests, it does not have the authority to regulate the Internet itself. Rather, the Commission should respect the mandate of the 1996 Act to rely on market forces to facilitate the competition and innovation that have been the hallmark of the Internet. At the same time, the Commission must take the steps necessary to ensure non-discriminatory access to the “last mile” facilities upon which the Internet rests and depends.⁵

Accordingly, in order to ensure that broadband networks permit the consumer choice and openness that has driven the success of the narrowband Internet marketplace, the Commission should:

- Require cable operators providing broadband access to an owned or affiliated ISP to make such access available to unaffiliated ISPs on a fair and non-discriminatory basis, thereby according consumers of cable broadband services the right to select the ISP of their choice without being forced to pay for another, unwanted ISP service;
- Require incumbent LECs, and any separate advanced services affiliates they may establish, to treat all unaffiliated ISPs in a fair and non-discriminatory manner, thereby according consumers of broadband telephony services the right to select the ISP of their choice;
- Encourage competition in last mile data transport facilities by requiring open and non-discriminatory access; and
- Decline to regulate peering arrangements in light of existing competition in the Internet backbone marketplace.

These measures will ensure that that the potential benefits of broadband services are indeed

⁵ See AOL Reply Comments, CC Docket 96-45 (February 6, 1998) at Attachment A, paper by Professor Jeffrey MacKie-Mason, University of Michigan, “Layering for Equity and Efficiency: A Principled Approach to Universal Service Policy” (discussing the distinction between telecommunications carriage and information services that utilize such carriage).

realized by the American public.

II. ROBUST COMPETITION AND CONSUMER CHOICE IN THE CURRENT NARROWBAND INTERNET ACCESS MARKET TOGETHER DELIVER A WEALTH OF BENEFITS TO CONSUMERS AND THE U.S. ECONOMY

The Internet is transforming the way people communicate, learn, recreate, socialize, do business, and live. It has been estimated that over 100 million people will access the Internet in 1998,⁶ communicating and exchanging information and ideas through e-mail and online discussion groups that create and promote electronic “communities” unconfined by national boundaries. Schoolchildren and businesspeople alike now turn to the Internet for ready access to vast quantities of information that can be updated instantaneously and drawn from any corner of the globe. Telecommuting and distance learning applications made possible by burgeoning information networks are enhancing the productivity and efficiency of the U.S. and international workforce. The explosive growth of the Internet and advanced services has driven the American economy forward, producing over 760,000 jobs in the information technology sector and contributed over \$200 billion to the annual U.S. economic output in 1996 alone.⁷ Continued development of the Internet’s full potential could mean 50-70 percent more new jobs with additional economic growth of almost \$900 billion by the year 2005.⁸

⁶ See *Internet Over Cable* at 6.

⁷ See Takumo Amano and Robert Bluhm, *The Internet and the Economy*, Global Internet Project, <<http://www.gip.org/GIP9E1.htm>> (1997).

⁸ See e.g., Dr. Robert B. Cohen, Economic Strategy Institute: An Economic Model of Future Changes in the U.S. Communications and Media Industries, (May, 1997) at 9.

The wealth of social and economic benefits the Internet has come to provide in such a strikingly brief period of time is linked fundamentally to the competitive environment in which the Internet operates. Internet services are currently provided by thousands of companies large and small, offering residential subscribers a variety of price and performance options primarily over the narrowband switched public telephone network. It is estimated that today there are approximately 4,850 local, regional and national Internet service providers,⁹ as well as countless other entities that create and offer Internet content services and websites. In addition, a highly competitive market has developed for end-user equipment such as personal computers and computer modems that provide access to Internet services. The market for Internet backbone services also is competitive, as evidenced by the growth of new competitive backbone facility providers and the increasing availability of network capacity.

This competitive market has thrived because the telecommunications infrastructure underlying the Internet is one open to all comers. Even though virtually all narrowband Internet access services today are delivered over local telephone company networks, existing regulatory requirements ensure that consumers may subscribe to the ISP of their choice using those facilities.¹⁰ Critically, consumers are free from any gatekeeper requiring them to purchase an ISP service that they *do not* want in order to reach the ISP that they *do* want. ISPs themselves can choose among an increasing number of competitive alternatives for

⁹ See *Internet Over Cable* at 18.

¹⁰ Indeed, the absence of “electronic gateways” or other bottlenecks to broad consumer access to the ISP of their choice has obviated the need for government regulation of Internet-related services. The importance of limited regulatory intervention was clearly recognized by Congress in the preamble to Section 230 of the Communications Act. See 47 U.S.C. § 230(a).

telecommunications transport facilities that connect their server locations with the LEC's "last mile" facilities. As a result of these factors, consumer demand for telephone-based access is exploding, and consumers have seen tangible price and performance benefits over the last few years – in turn spurring further innovation, reducing prices, and transforming the Internet experience with new applications. In sum, the Internet's success in the narrowband environment powerfully demonstrates the wisdom of a public policy framework that ensures an open telecommunications infrastructure, while refraining from regulation of the robustly competitive Internet marketplace operated over that infrastructure.

III. THE SUCCESSFUL DEPLOYMENT OF BROADBAND AND THE DELIVERY OF THE PUBLIC INTEREST BENEFITS IT OFFERS WILL BEST BE ENSURED BY OPEN NETWORK INFRASTRUCTURES

A. Broadband Services Will Provide the Public Valuable Benefits If They Are Deployed in a Manner That Fosters Consumer Choice

The deployment of broadband access to the Internet is a development rich with potential. Broadband services hold the promise of new technical capabilities and the potential for upgraded or wholly new applications for the unprecedented medium of the Internet. As with narrowband, swift deployment and adoption of broadband Internet capabilities depend upon promotion of an open and non-discriminatory underlying infrastructure. Both Congress and the Commission have recognized the critical link between open access to communications infrastructures and the delivery of public interest benefits to consumers. The interest in ensuring that consumers receive the benefits of competition and new services resonates throughout the Communications Act and Commission policy, from the agency's general obligation to regulate in the public interest to its specific statutory responsibility to promote the

deployment of advanced telecommunications capability to all Americans under Section 706 of the 1996 Act.¹¹

As the Commission itself detailed in this and other proceedings, broadband access service will provide the public with vast new opportunities to capitalize on the information revolution.¹² In particular, broadband services have the potential to provide an “always on” connection to the Internet coupled with higher bandwidth and faster data transmission speeds. These features will enhance the ability to deliver Internet content to subscribers and will support the development of new or expanded Internet applications. Together, these developments will create new economic opportunity, improve the nation’s educational, social, and health care services, and “create a more productive, knowledgeable and cohesive nation.”¹³

As discussed above, the American public to date has realized significant benefits from the Internet in large part because the underlying transport facilities are deployed in a manner that is open and promotes consumer choice, spurring competition to create innovative offerings and applications that maximize the potential capabilities of the Internet. Consumer demand for broadband services would surely flourish in a similarly open environment that allows

¹¹ The Telecommunications Act of 1996, Pub. L. No. 104-104, Title VII, § 706, 110 Stat. 53.

¹² See generally *NOI; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, FCC 98-188 (rel. Aug. 7, 1998) (Memorandum Opinion and Order and Notice of Proposed Rulemaking) (“*Wireline Advanced Services NPRM*”); *Commission to Hold Bandwidth En Banc Hearing July 9, 1998* (Public Notice) (rel. June 30, 1998).

¹³ *NOI* at ¶ 1.

consumers high-speed access to the ISP and content services they favor, driving broad penetration of these services and the widespread enjoyment of broadband's benefits by consumers.

In the *NOI*, the Commission has clearly identified the key issues relevant to promoting open access and consumer choice in the market for broadband services. Specifically, the Commission asks whether an “unregulated market [is] likely to give the holders of last miles the ability and incentive to discriminate against all ISPs or in favor of their own ISP operations, to the detriment of consumers.”¹⁴ AOL submits that, while the Commission is already addressing the provision of data services by local exchange carriers in the Section 706 Notice of Proposed Rulemaking,¹⁵ the agency also should take every opportunity available to it to ensure that the public interest benefits of an open cable broadband infrastructure are realized.

B. The Commission Should Promote the Public Interest Benefits of Cable Broadband Networks By Ensuring Consumer Choice Among Providers of Internet Services

The Commission's concerns about consumer choice in Internet access bear greatly on the fate of the cable broadband platform. Cable operators possess a “last-mile” infrastructure potentially capable of offering consumers the substantial benefits of broadband Internet access. With the particularly high capacity of cable system networks, cable operators report that they can provide end-users a direct, “always on” connection to the Internet at speeds up to 10

¹⁴ *NOI* at ¶ 79.

Mbps.¹⁶ Yet, the full benefits of broadband cable Internet access will be realized only if the underlying transport is deployed in a manner consistent with the Internet's fundamental demand for an open and competitive marketplace.

Purchasers of broadband access – end-users and ISPs alike – will demand the openness and network connectivity present in narrowband networks today. In particular, consumers will expect – as they do today with narrowband services – that they should not have to purchase two ISP services to get the one they want. If this choice is decided by operators of a closed network, the market for cable broadband access will not develop as rapidly as it otherwise would and, as a result, these services will not achieve the ubiquitous deployment and penetration that the public interest warrants. In turn, reduced deployment and consumer choice will stifle innovation, constrain the free flow of information and electronic commerce, and lead to higher prices.

Accordingly, the Commission should take every opportunity available to it to ensure that the public interest benefits of cable broadband networks are indeed realized. In particular, the Commission should move, at every opportunity, to take the steps necessary to ensure that cable operators providing broadband access to an affiliated ISP make such access available to unaffiliated ISPs on a reasonable and non-discriminatory basis.

(...Continued)

¹⁵ See *Wireline Advanced Services NPRM*, *supra* note 11.

¹⁶ See *How Fast is Road Runner?*, <<http://www.rr.com/rdrun/about/tech/howfast.html>> .

C. Open Cable Broadband Networks Will Spur “Last Mile” Competition, Stimulating the Deployment of Data-Friendly Networks and Helping to Achieve the Goals Intended by the 1996 Act

Beyond the direct consumer benefits of broadband Internet access described above, an open cable broadband architecture would also enhance competition in and among providers of “last mile” access. If both the existing providers of “last mile” telephone facilities and the existing “last mile” providers of video facilities offered data transport services, ISPs and others could choose between the “last mile” loop offered by one and the “last mile” loop offered by the other. That choice would be based on the relative price, performance, and features offered by each. In such a marketplace, ISPs and the Internet generally could bring about the competition between two infrastructures that was contemplated by the Telecommunications Act of 1996.

Facilities-based competition in the broadband context – particularly in the last mile – would free ISPs and the public they serve from their current exclusive reliance upon voice-oriented telephone company facilities and stimulate the development of data-friendly networks. This competition will, in turn, drive down prices and increase the affordability and widespread availability of Internet access to the benefit of all consumers.

D. The Commission Should Promote the Public Interest Benefits of Telephone Broadband Networks by Ensuring Consumer Choice Among Providers of Internet Services

Consistent with the foregoing, it is essential that the foundation of openness and consumer choice be preserved as advanced telecommunications capabilities are likewise

deployed over the existing telephone infrastructure. The Commission has long recognized, and taken steps in the narrowband telephony environment, to ensure the “continued competitiveness of the already robust information services market”¹⁷ by establishing a range of safeguards in its *Computer Inquiry* proceedings.¹⁸ Similarly, in enacting the 1996 Act, Congress specifically provided for certain safeguards to ensure that the Bell Operating Companies (“BOCs”) would be prevented from acting on their very real incentives to engage in anticompetitive conduct.¹⁹

To that end, the Commission must ensure that sufficient safeguards are in place so that incumbent LECs cannot discriminate against unaffiliated ISPs. In particular, despite this commitment to openness and competition by both the Commission and Congress, the tentative conclusion in the Commission’s *Wireline Advanced Services NPRM* that a BOC advanced data services affiliate will not be deemed “an incumbent LEC” or a “successor or assign” of a BOC could have the consequence – presumably unintended – of negating the pro-competitive safeguards now applicable to the BOCs (and GTE).²⁰ AOL therefore urges the Commission to make clear that, to the extent an incumbent LEC establishes a separate data affiliate for advanced services, the BOC affiliate must treat all ISPs in a non-discriminatory fashion,

¹⁷ *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, CC Docket Nos. 98-10 and 95-20, FCC 98-8, ¶ 1 (Jan. 30, 1998) (Further Notice of Proposed Rulemaking); *see also Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, 11 FCC Rcd 21905 (1996) (subsequent history omitted).

¹⁸ *Id.*

¹⁹ *See* 47 U.S.C. § 272.

²⁰ *Wireline Advanced Services NPRM* at ¶¶ 89-91.

whether or not they are affiliated with the parent LEC.²¹ Such a safeguard is essential to promote the continued growth of the Internet and the choices consumers will have to access all its innovative services and applications.

IV. THERE IS NO NEED FOR THE COMMISSION TO REGULATE PEERING ARRANGEMENTS IN LIGHT OF EXISTING COMPETITION IN THE INTERNET BACKBONE MARKETPLACE

The *NOI* seeks comment on whether the Commission should take any action to “preserve efficient peering arrangements among Internet companies.”²² There currently exists competition in the Internet backbone marketplace and, thus, the Commission should be reluctant to interfere with its operation. While AOL is aware that certain controversies have arisen in connection with announced changes in peering policies by some of the largest backbone networks, such disputes are not necessarily indications of market failure or anticompetitive conduct that require regulatory intervention. To date, they appear to reflect only natural growing pains in a maturing market.

For many years, large and small companies who offer ISP or Internet backbone services have negotiated voluntary, mutually acceptable agreements for the origination, termination, and exchange of traffic. Among these types of agreements, “peering” can refer to both the mutual exchange of traffic between backbone networks and/or the exchange of traffic between and among backbone networks, Internet service providers, and others.

²¹ AOL will more completely detail its position on this issue in its comments to be filed in response to the *Wireline Advanced Services NPRM*.

²² *NOI* at ¶ 79.

Frequently, but not always, these arrangements do not include explicit compensation mechanisms. Instead, network operators typically share the costs of connecting and upgrading their facilities by mutual agreement and no dollars change hands. These arrangements, which have been concluded without statutory or regulatory directives, are an important element of the global network-of-networks that comprises the Internet today.

Recent marketplace developments, including growing size and scope disparities among backbone networks, reportedly have now placed some strains on a number of “peers” and peering arrangements. Nonetheless, so long as entry by new providers continues to foster a competitive marketplace and users and ISPs continue to enjoy realistic choices among backbone networks, there should be no need for regulatory intervention. In an environment of open entry, competition, and choice, marketplace forces rather than regulatory fiat will always be the best arbiter of the public interest. The Commission should, of course, continue to monitor marketplace developments.²³

Moreover, Commission regulation of Internet peering would add unnecessary costs to services of ISPs and backbone providers without any corresponding public benefit. Peering regulations would not only impose increased transaction costs on the parties seeking to enter such an agreement, but also limit the parties’ flexibility to structure economically efficient relationships and to respond to shifting consumer demands. Intense competition in the Internet marketplace suggests that these costs likely would be passed directly to consumers. Yet, purchasers of Internet services may well be harmed rather than helped by the intervention

²³ See e.g., “Peering Standoff Must Come To An End,” Internet Week Newsletter, September 11, 1998 at 3 (discussing a proposal for a Brokered Exchange System (BES Plan)
(Continued...)

because they would face reduced service quality and receive no other commensurate benefits in the absence of any market failure that could be corrected by regulation. Accordingly, in the current environment, the Commission should refrain from any effort toward regulating peering arrangements.

(...Continued)
that would set peering rules).

V. CONCLUSION

The open architecture and robust service competition fundamental to the narrowband Internet marketplace have provided profound benefits for our economy and our nation. The advent of broadband Internet access offers a promising opportunity to build upon and expand the competition and innovation that has been the hallmark of the Internet, thereby delivering still greater benefits to the American public. In order to realize fully this vision, the Commission must ensure that the broadband infrastructure upon which these new opportunities depend, whether provided by telephone or cable companies, will be open and available to all.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Steven N. Teplitz", is written over a horizontal line.

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